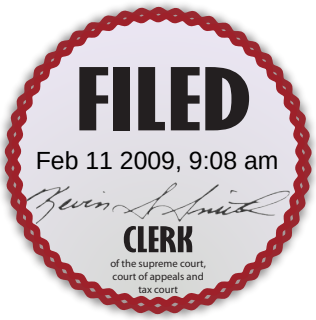

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IN THE COURT OF APPEALS OF INDIANA

JOSHUA E. ROBINSON,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 48A04-0807-CR-419
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE MADISON SUPERIOR COURT
The Honorable Dennis D. Carroll, Judge
Cause No. 48D01-0708-FA-138

February 11, 2009

MEMORANDUM DECISION - NOT FOR PUBLICATION

BARNES, Judge

Case Summary

Joshua Robinson appeals his conviction for Class A felony dealing in cocaine. We affirm.

Issues

Robinson raises two issues, which we restate as:

I. whether the jury was properly instructed; and

II. whether there is sufficient evidence to support his conviction.

Facts

On March 25, 2007, Detective Kevin Early of the Anderson Police Department saw Robinson get into a car and drive away with another man, Chevy Jones. Detective Early knew Robinson did not have a driver's license and called Patrol Officer Gabe Bailey, who was in the area, and asked him to conduct a traffic stop. Officer Bailey initiated a traffic stop, and Robinson stopped in a parking lot. As Officer Bailey was getting out his patrol car, Jones got out of the passenger side of Robinson's car and started to walk away. Concerned Jones would flee, Officer Bailey told him to stop and walked toward him. When Officer Bailey made contact with Jones, Robinson got out of the car and began walking away. Officer Bailey instructed Robinson to stop. Robinson looked at Officer Bailey and ran away. As he ran away, Officer Bailey noticed that Robinson had a bag containing a white substance in his hand.

Officer Bailey stayed with Jones and radioed for back-up, describing Robinson and the direction in which he fled. Officer Chris Christian was in the area, had seen

Robinson flee, and heard the call. Officer Christian pursued Robinson in his patrol car. He observed Robinson kneeling down between two houses. Officer Christian chased Robinson on foot and eventually detained Robinson.

When Robinson was detained, his feet were bare and he had $2360 in cash in the front pocket of his jeans. Officer Christian returned to the area where he had seen Robinson kneeling and found Robinson's shoes. In a grassy area near the shoes, on the other side of a chain-link fence, a baggie containing 21.97 grams of crack cocaine was found.

On August 1, 2007, the State charged Robinson with Class A felony possession of cocaine, Class A misdemeanor resisting law enforcement, and Class C misdemeanor operating a motor vehicle without ever receiving a license. A jury found Robinson guilty as charged. Robinson now appeals the possession of cocaine conviction.

Analysis

I. Jury Instruction

Robinson first argues that the jury was improperly instructed. In reviewing a trial court's decision to give or refuse tendered jury instructions, we consider: "(1) whether the instruction correctly states the law; (2) whether there is evidence in the record to support the giving of the instruction; and (3) whether the substance of the tendered instruction is covered by other instructions which are given." Guyton v. State, 771 N.E.2d 1141, 1144 (Ind. 2002). "The manner of instructing a jury lies largely within the discretion of the trial court, and we will reverse only for abuse of discretion." Henson v. State, 786 N.E.2d 274, 277 (Ind. 2003).

The instruction at issue provided:

> In order to determine whether the requisite intent exists, you may resort to the reasonable inferences arising from the surrounding circumstances. Evidence of a defendant's intent to deliver, such as possession of a large quantity of drugs, large amounts of currency, scales, plastic bags, and other paraphernalia, as well as evidence of other drug transactions, can support a conviction for dealing in controlled substances. Furthermore, the more narcotics a person possesses, the stronger the inference may be that he intended to deliver it and not consume it personally.

App. p. 103.

At trial, defense counsel objected:[1]

> I do object Judge and just briefly I have reviewed the cases of Ladd and Wilson and agree it is an accurate statement of the law but I believe . . . the Court instructing the Jury on it draws undue attention to it would be the nature of my objection.

Tr. pp. 272-73.

On appeal, Robinson argues that this instruction misled the jury because no evidence of other drug transactions, scales, plastic bags, or paraphernalia was introduced at trial. Robinson also claims that the instructions repeated use of the word "inference" "improperly instructed the jury that such evidence may have been present." Appellant's Br. p. 11.

The State responds by arguing that Robinson's claim is waived because it is not consistent with his objection at trial. It is well-settled that a defendant may not appeal the

[1] The transcript indicates that the trial court was speaking. However, from the nature of the discussion and the substance of the claim, it appears that defense counsel was actually making the objection. Because there is no argument to the contrary, we will assume that to be the case for purposes of this appeal.

giving of an instruction on grounds not distinctly presented at trial. See Helsley v. State, 809 N.E.2d 292, 302 (Ind. 2004). Nevertheless, we conclude that the issue raised on appeal is not a distinctly different basis for his objection. Ultimately, Robinson was and is concerned about the emphasis the instruction puts on the circumstantial evidence, or lack thereof, used to establish his intent to deliver cocaine. This was the issue before the trial court and is the same issue raised on appeal.

"The purpose of the requirement for a specific and timely objection is to alert the trial court so that it may avoid error or promptly minimize harm from an error that might otherwise require reversal and result in a miscarriage of justice and a waste of time and resources." McDowell v. State, 885 N.E.2d 1260, 1262 (Ind. 2008). Here, the parties postponed a discussion of this instruction overnight so defense counsel and the trial court could conduct legal research. Before ruling on the objection the trial court recalled giving a similar instruction in the past and noted it was reasonable to reconsider it. The trial court also acknowledged that it had not thought about defense counsel's "particular objection before." Tr. p. 273. Robinson is not raising a new issue for the first time on appeal. See McDowell v. State, 885 N.E.2d 1260, 1263 (Ind. 2008) (considering the colloquy between the trial court and counsel to conclude that the trial court gave consideration to essentially the same issue that is presented on appeal).

As for the merits, Robinson specifically argues:[2]

> the instruction implicitly suggested that he may have been in possession of scales, other paraphernalia, and there was other

[2] Robinson does not argue that the instruction is improper based on the rationale set forth in Ludy v. State, 784 N.E.2d 459 (Ind. 2003).

> evidence of drug transactions. Robinson suggests that the Instruction should have been limited from any reference, for purposes of inference, of items that were not circumstantial or direct evidence in the case presented to the jury.

Appellant's Br. p. 11. Here, there was evidence as to the quantity of cocaine he possessed and the amount of cash found in his pocket. To that extent, he has not established that the trial court abused its discretion in giving this instruction.

Even if it was an abuse of discretion for the trial court to reference in the instruction items not supported by the evidence, the error is harmless. If evidence of scales, baggies, paraphernalia, or drug transactions can be used to support a conviction, then the absence of such evidence, as is the case here, would tend to show that the State did not meet its burden of proving that Robinson possessed the drugs with the intent to deliver. The fact that the instruction referenced these examples and no such evidence admitted at trial works to Robinson's benefit. See Penn Harris Madison School Corp. v. Howard, 861 N.E.2d 1190, 1197 (Ind. 2007) (observing that "where an instruction presents a correct statement of law, but no evidence supports it, the objecting party is generally unharmed by the instruction."). To the extent the trial court erred in giving the instruction because it was not supported by the evidence, the error is harmless.

II. Sufficiency of the Evidence

Robinson also argues that there is not sufficient evidence to establish that he intended to deliver the cocaine. Upon a challenge to the sufficiency of evidence to support a conviction, we do not reweigh the evidence or judge the credibility of the witnesses, and we respect the jury's exclusive province to weigh conflicting evidence.

McHenry v. State, 820 N.E.2d 124, 126 (Ind. 2005). We must consider only the probative evidence and reasonable inferences supporting the verdict. Id. If the probative evidence and reasonable inferences drawn therefrom could have allowed a reasonable trier of fact to find the defendant guilty beyond a reasonable doubt, we must affirm the conviction. Id.

"Because intent is a mental state, a trier of fact must generally resort to the reasonable inferences arising from the surrounding circumstances to determine whether the requisite intent exists." Wilson v. State, 754 N.E.2d 950, 957 (Ind. Ct. App. 2001). As a general matter, circumstantial evidence showing intent to deliver may support a conviction for dealing in cocaine. Id. "Possession of a large quantity of drugs, money, plastic bags, and other paraphernalia is circumstantial evidence of intent to deliver." Id. "Furthermore, the more narcotics a person possesses, the stronger the inference that he intended to deliver it and not consume it personally." Id.

Here, Robinson points out that he possessed significantly less cocaine than the 105 grams of cocaine discovered in another case in which we concluded there was sufficient evidence to support the conviction. See Turner v. State, 878 N.E.2d 286, 296 (Ind. Ct. App. 2007), trans. denied. Nevertheless, Robinson possessed 21.97 grams of cocaine—significantly more than the three grams required to enhance the offense to a Class A felony. See Ind. Code § 35-48-4-1(b). Robinson also claims that the $2360 found in his pocket could have come from his Social Security benefits or his mother's life insurance benefits. Robinson is simply asking us to reweigh the evidence, which we cannot do.

There was sufficient evidence from which the jury could have inferred his intent to deliver cocaine.

Conclusion

Any error in the instruction of the jury was harmless because it tended to show that the State not did present certain evidence that would support an inference of dealing in cocaine. Further, there is sufficient evidence from which the jury could have inferred Robinson's intent to deal in cocaine. We affirm.

Affirmed.

BAILEY, J., and MATHIAS, J., concur.